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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-859

SAN FRANCISCO-OAKLAND MAILERS UNION No. 18 and SAN FRANCISCO TYPOGRAPHICAL UNION LOCAL No. 21,
Petitioners,

vs.

HARRY JOHNSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
First Appellate District

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First Appellate District

Harry Johnson, plaintiff below and respondent herein, opposes and objects to petitioners' request for the issuance of a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District to review the decision of August 14, 1975 entered against petitioners, which decision became final on October 12, 1975 upon remittitur by the Supreme Court of the State of California after denial of a Petition for Hearing to that court.

JURISDICTION

Respondent respectfully contends that this court does not have jurisdiction pursuant to 28 U.S.C. §1257(3) in that the title, right, privilege and/or immunities set up or claimed by petitioners herein did not arise under the Constitution, treaties or statutes of the United States. Rather the decision here in issue was rendered solely upon adequate and independent grounds of the laws of the State of California, said laws not being repugnant to the Constitution, treaties or laws of the United States.

STATEMENT OF THE CASE

1. SUMMARY OF THE FACTS.

A. Relationship of the Parties Prior to the Fire Bombing.

This case arises out of a fire bombing on October 26, 1965 occurring in Mill Valley, California. Prior thereto, respondent had acquired ownership interest and publishing rights in a group of weekly newspapers in Marin County collectively referred to as "The Marin Guide" (RT 127, 130).[1] He also acquired an option to buy the plant and equipment located on Caledonia Street in Sausalito, California (RT 133). At the time of respondent's acquisition of the publishing rights, the newspapers were being printed in San Francisco by a subcontractor (RT 129). Respondent planned to reopen the Sausalito plant and

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[1]RT references are to the voluminous trial Reporter's Transcript which, due to its size, is not appended. Respondent will immediately file a copy if desired.

reemploy the Local 21 members in the composing room (RT 134, 135, 136). He did not plan to employ any members of Local 18 to do the mailing work because it was obvious from the books of the newspaper that the mailing costs were exorbitant (RT 127). Repondent's plan was to have the mailing done by a union controlled mailing house in San Francisco (RT 137).

Russell Wagle, President of Local 21, suggested that respondent contact Douglas Smith, President of Local 18, to look into the possibility of having the mailing done at the plant by Local 18's members (RT 144). Respondent contacted Smith who agreed to do the mailing in one shift with a crew of six Local 18 members (RT 145). When the Local 18 mailers showed up for work, however, there were not six, but ten to fifteen (RT 147). Respondent had a discussion with Rhodes, the Local 18 foreman, who agreed that fifteen men were too many and that the work could be done with six men plus two supervisors (RT 149). Respondent then observed a Local 18 mailer shove a screwdriver into the mailing machine 30 minutes after the start of operations, thus making the machine inoperable (RT 150). The Local 18 members then left the plant and went to a bar across the street (RT 150).

During the next printing of the newspaper, about one week prior to the fire bombing, eight mailers showed up. The mailing machine "broke down" again, and the Local 18 members again left the plant to go to the bar across the street (RT 154).

Respondent thereafter decided that he would not go through this procedure with the members of Local 18 again (RT 154). He decided to have the mailing done at a union mailing house in San Francisco (RT 154).

At a labor conference in San Mateo on October 25, 1965, the night before the fire bombing, Wagle told Smith that respondent was going to operate the plant without the mailers (RT 331-332). Thereafter, Wagle called and advised his members to leave the Caledonia Street plant and "go out for a cup of coffee" (RT 337). Wagle's purpose for telling his members to leave the job was two-fold: (1) Local 21 did not have a contract with respondent; (2) respondent was getting rid of the mailers (RT 437). A picket line was set up on the night of the 25th in front of the Caledonia Street plant. Members of both Locals 18 and 21 walked the picket line (RT 161, 338, 438).

B. Events on the Picket Line on October 25, 1965.

A picket line was established on the night of October 25, 1965 in front of the Caledonia Street plant and George Hogan, an organizer and elected official of Local 21 was on the picket line (RT 161, 425). The pressmen arrived and advised respondent they would not press the paper (RT 162). Thereafter, respondent made arrangements to have the newspaper printed at a plant in Walnut Creek (RT 477). Prior to the printing, mats made out of a fibered material with a type-produced imprint were prepared at the Caledonia Street plant (RT 164, 165). Respondent at-

tempted to carry the mats through the picket line to his automobile for transportation to the Walnut Creek printing plant. In the process, he was attacked and beaten by members of the picket line (RT 164). Some of the mats were taken from him, torn and destroyed (RT 164, 166, 477, 478).

Smith, Rhodes and Hogan were identified as those who were in the mob that attacked respondent (RT 165). Hogan at the time of the Marin Guide dispute was an officer of Local 21 (RT 425). He was an elected official who would assist the President of the Union in his day-to-day duties (RT 425). He was Wagle's personal representative on the scene of the Marin Guide dispute (RT 425).

Thereafter, new mats were made at the Caledonia Street plant (RT 166). Respondent left through the back of the building with the mats in his hand and went over a fence to meet his wife who had been summoned to meet him in order to transport him and the mats to the printing plant in Walnut Creek (RT 577, 578). He rushed into the waiting automobile followed closely by eight or nine or more men who tried to pry open the door (RT 578). They stomped, hit and rocked the car (RT 578, 586). On the way to Walnut Creek, respondent's car was followed by another car which tried to nudge his car off the road (RT 504).

C. Events of the Night of the Fire Bombing, October 26, 1965.

After having the paper printed in Walnut Creek, respondent brought the newspaper back to a building

he owned in Mill Valley at 200 Shoreline Highway (RT 166). Present at the 200 Shoreline address were approximately 30 to 40 volunteers, 10 to 15 of whom were teenagers who had arrived to assist in getting the paper out (RT 166, 167, 168).

The picketers discovered that mailing work was being done at the 200 Shoreline address and immediately proceeded to set up a picket line at that location (RT 169). The picket line was set up by Smith, Dwane Jones, then Secretary-Treasurer of Local 18, and John DeMartini, Executive Board member for Local 21 (RT 339, 340, 424, 442, 567). Picketers from Local 18 and Local 21 showed up to man the picket line (RT 340). Before the bombing, some 80 people were assembled in front of the Shoreline address (RT 169, 523). Wagle and Hogan recruited members of Local 21 to assist in the picketing on the night of the 26th (RT 441). They wanted a show of strength and protection at the picket site (RT 441). Hogan was present on the night of the 26th at the picket line (RT 279).

On the night of the fire bombing, a truck belonging to respondent was virtually ripped apart; tires were punctured, the distributor cap was pulled off and other wires were pulled out of the truck, and a bomb was placed inside (RT 215, 299).

(1) Smith's Position With Respect to Local 21 and Local 18 on the Night of the Fire Bombing.

On the night of the bombing, Douglas Smith was the President of Local 18 (RT 322). In addition, he

was in charge of all the pickets who were walking the picket line (RT 352, 383). This was true irrespective of whether they were members of Local 18 or Local 21 or any other union (RT 341). While on the picket line, Harris, a member of Local 21 and DeMartini, an officer of Local 21, were under Smith's charge (RT 344, 385). When Smith wasn't there, Bill Rhodes of Local 18 was in charge of the picket line, but when Smith appeared on the scene he supplanted Rhodes in his capacity as Picket Captain (RT 341, 342). Smith's authority as Picket Captain in charge of all picketers on the joint picket line was recognized by Wagle, President of Local 21 (RT 446). When Wagle arrived at the picket line, it appeared to him that Smith was in charge (RT 443). Wagle did not object to Smith being in charge of the picket line (RT 443). Smith had the authority as far as Local 21 was concerned and as far as Wagle was concerned to order members of Local 21 who had been misbehaving off the picket line (RT 445). He also had the authority to go to John DeMartini or George Hogan, officers of Local 21, and instruct them to remove members of their union from the picket line for improper conduct (RT 445, 446). Wagle saw nothing on the night of the 26th while he was at the picket line which led him to believe that he should remain at the scene to exercise authority over his members (RT 460).

Jim Harris, a member of Local 21 and an individual walking the picket line on the night of the 26th, recognized that he was required to ask Smith for permission before he could cross the picket line (RT 516, 531).

(2) Events Surrounding the Bombing Incident.

At or about midnight on the 26th, respondent and six or seven teenagers were in the 200 Shoreline address wrapping newspapers (RT 1676). Respondent saw Smith peeking around a doorway into the room where respondent and the teenagers were working (RT 175). Smith was wearing a wide-brim felt hat and a tweed overcoat (RT 175, 177, 599). A fire bomb came hurtling through the room from the door where Smith had been crouched, striking the wall on the opposite side (RT 180).

The bomb appeared to be a typical grenade beer can with something attached to it (RT 180). It created a fast-burning intense fire in the room with temperatures of over 1200 degrees (RT 106). Respondent could not see the face of the person who threw the bomb, but described the individual as having the same hat and coat as Doug Smith was wearing (RT 179). In a matter of seconds, the entire room was engulfed in flames (RT 180). The occupants of the room exited from the building to an adjacent breezeway (RT 180-181). Respondent escaped from the building. Tom Driskoll hollered, "Mr. Johnson, that's the man who threw the bomb. Grab him" (RT 183). That individual was Smith (RT 184). Driskoll testified at the criminal trial of Smith [which testimony was read into the record at the trial of the within action] that he saw Smith, and the man who was with him, walking out of the room from which the bomb had been thrown to the outside in a "real brisk walk" (RT 603).

Based primarily on this evidence, Smith was tried on January 6, 1966 in the Marin County Municipal Court and found guilty of wilfully and unlawfully entering land belonging to Harry Johnson for the purpose of injuring the property rights of said owner (see Plaintiff's Exhibit 3, RT 92, 368). Smith was sentenced to six months in jail and fined $500 (RT 368).

In spite of this evidence, Smith denied having thrown the bomb (RT 356). He was suspicious that one Warren "Suitcase" Jones, a member of Local 18, had in fact thrown the bomb (RT 352). Just subsequent to the bombing, Smith testified that he saw "Suitcase" Jones exiting the breezeway leading to the area where the bomb was thrown (RT 348, 352); that prior to that time he saw Suitcase on the picket line and he was drunk and disorderly (RT 346); that subsequent to the bombing, Smith overheard Suitcase boasting in the mailroom of the San Francisco Chronicle that he had "cleaned out the rats at the Marin Guide" (RT 350); additionally, that he had received a call from a Mr. Ross, a member of the mailers, advising they had heard in Los Angeles that Suitcase had thrown the bomb (RT 352). At the time of the criminal proceeding Smith "had a very good idea" who had thrown the bomb (RT 361). In spite of this, Smith neither testified at the criminal trial nor advised his defense attorney "that he had a good idea" who had thrown the bomb (RT 361, 362).

Appellants produced "Suitcase" Jones as a witness at the trial. Suitcase testified that he entered the

building and threw the bomb (RT 663). His testimony indicated that he entered through Door No. 5 which is in the rear of the building (RT 662). Herbert Owen, the Tam Valley Fire Chief, arrived at the scene soon after the fire began and found that Door No. 5 was locked (RT 319). Suitcase testified that when he threw the bomb he was by himself (RT 664). Another witness produced by appellants, Henry Holl, a member of Local 18, testified that he was right behind Suitcase when he threw the bomb (RT 802, 804). Suitcase further testified that he had walked a picket line at the Sausalito plant during August and September of 1965 (RT 670). He said that he had walked the picket line on three or four occasions prior to the night of the bombing (RT 670). Clearly, this fire bombing occurred on the second night of picketing; there had been no picketing in August or September of 1965 (RT 741, 742).

Additionally, he testified that he sought and received assurances from the attorneys, representing Local 21, Local 18 and Doug Smith individually that the statute of limitations had run on an arson prosecution in California before he agreed to testify (RT 688).

D. Events Subsequent to the Bombing.

Respondent placed Smith under citizen's arrest on the night of the bombing (RT 186). On the day following the bombing, respondent was told by Hogan, organizer for Local 21, that if respondent did not drop his charges against Smith that he would not

make it alive to the District Attorney's Office to file the formal charges (RT 194, 195).

The picketing continued for over two years subsequent to the bombing (RT 188). Smith was tried in January, 1966 in the Municipal Court of Marin County and was found guilty of wilfully and unlawfully entering land belonging to Harry Johnson for the purpose of injuring the property rights of said owner (RT 92, 352, 368, Plaintiff's Exhibit 3). Smith was convicted and sentenced to six months in jail and fined $500 (RT 368). Smith spent 30 days in jail and then went on the work furlough program for the remaining five months (RT 368). During that time he continued to operate as President of Local 18 (RT 368). Smith's conviction was appealed to the U.S. Supreme Court who refused to overturn it (RT 369). It was general knowledge within the Union that Smith had been convicted and that the U.S. Supreme Court had refused to overturn his conviction (RT 370). Smith testified that he kept no secrets from his Executive Committee, or from the Union (RT 379). Further, he testified that he most likely advised the Union and the Executive Committee of everything that went on at the Marin Guide (RT 379). The minutes of the Executive Committee of the Union of October 30, 1965 reported that both the Executive Committee and the Union concurred in the Union officers' actions at the Marin Guide lockout (RT 380).

In February of 1966, Smith announced to the Union that he had been found guilty in the criminal trial

and that the maximum sentence had been imposed (RT 380, 381). Subsequent thereto, in May of 1966, while Smith was still serving his sentence, he was re-elected as President of Local 18 (RT 381).

Smith continued to frequent the picket line for the two-year period subsequent to the bombing (RT 577, 189, 190). When Smith was on the picket line, he was in charge of all the picketers, including members of Local 21 who were there (RT 383, 385).

There was an administrative procedure whereby a member of Local 18 could bring charges against any other member of Local 18 who had thrown the bomb (RT 370, 371). No charges were ever instituted against Doug Smith (RT 371, 372). Additionally, Smith was never advised by officers of Local No. 21 that he could no longer be in charge of their members when they were on the picket line (RT 387). No action was ever taken by Local No. 21 against Smith to see that he was taken off the picket line subsequent to the bombing (RT 386, 387, 452).

Subsequent to the bombing and prior to the trial in January of 1966, President Wagle of Local 21, along with others, set up the Douglas Smith defense fund (RT 451). Wagle's name was on the letterhead that went out for requests for contributions; as was that of Greg Bachich, the Secretary of Local 21. Wagle personally contributed to the Douglas Smith defense fund (RT 451, 452). At Wagle's request, Smith may have appeared at a meeting of Local 21 to explain his participation in the Marin Guide dispute (RT 454). Local 21 passed a resolution approv-

ing the setting up of the Douglas Smith defense fund (RT 467). Smith's $500 fine was paid for out of this fund (RT 389).

E. Threats, Intimidation and Anonymous Telephone Calls.

Threats, intimidation and anonymous telephone calls were perpetrated against the employees of the Marin Guide and against Eleanor Johnson, wife of Harry Johnson, subsequent to the bombing (cites *infra*). Charles Holland, a sergeant in the United States Army and part-time employee of Harry Johnson, was threatened on numerous occasions by Smith (RT 472). In addition Smith threatened to damage Holland's military career if he did not quit the Marin Guide (RT 471). Smith offered to pay Holland what Johnson was paying him if he would not work for the Marin Guide (RT 471).

Jerry Crews, another employee of the Marin Guide, was jumped and beaten by pickets shortly after the labor dispute started (RT 474).

Michael Healy, editor of the newspaper, was physically struck by a picket sign while going across the picket line (RT 533). He was threatened by a picket who had been on the picket line on a consistent basis (RT 533). On more than one occasion he was told "We will bury you", and "Don't worry, Healy, we'll get you, we'll bury you." (RT 533, 534). The individual who had threatened Healy was a member of the picket line and conferred with Bill Rhodes, the member of Local 18 who was in charge of the picket line

when Smith was not there (RT 549). Shortly after the commencement of the strike, Healy received several anonymous phone calls (RT 534).

Eleanor Johnson, wife of Harry Johnson, was threatened in front of Mayer Department Store in Mill Valley, California prior to Christmas of 1967 (RT 570). George Hogan, an officer of Local 21 and three other men whom Mrs. Johnson had seen on the picket line on numerous occasions, stopped Mrs. Johnson and her children on the sidewalk in front of the store (RT 570). Hogan said to her "If you don't tell your husband to drop this lawsuit with Smith, you will find him boxed up" (RT 579). Hogan also looked at Mrs. Johnson's children and said, "Your children are walking now" or "are healthy now" (RT 579, 591).

Approximately eight months after the fire bombing, respondent was attempting to print his paper in a printing plant in San Jose (RT 196, 197). In September of 1966, George Hogan threw an electrical switch controlling a large tubular press at the plant (RT 220). At the time, two of Mr. Johnson's employees, a Mr. Heon and a Mr. Lester, were inside the press (RT 219, 220). Hogan, the Local 21 organizer, told respondent that they would blow up the plant in San Jose if he didn't drop his lawsuit against Doug Smith (RT 197, 218, 219). Picketers were present in front of the San Jose plant on the night of November 2, 1966 when that plant was burned to the extent of $500,000 damage (RT 712, 720).

REASONS FOR DENYING THE PETITION

1. THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO GRANT THE INSTANT PETITION.

The Supreme Court cannot review a state court decision if that decision rests on an adequate state ground. *Murdock v. Memphis,* 20 Wall. 590. Likewise, where the state court has decided both state and federal questions there can be no review if the decision on the federal issue was unnecessary in light of the disposition of the state question. *Foxfilm Corp. v. Muller,* 296 U.S. 207; *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487.

This Court has often recognized and reaffirmed the right of states to deal effectively with violence and threats thereof which appear in labor disputes and has, consequently, sustained a variety of remedial measures taken by the states as against numerous contentions that local law had been preempted by federal labor legislation, *United Mine Workers v. Gibbs,* 283 U.S. 715; *Allen-Bradley v. Wisconsin Bd.,* 315 U.S. 740. The California courts have applied local substantive and evidentiary law to remedy conduct neither sanctioned, protected nor preempted by federal legislation. The Court below did not interpret nor presume to apply federal law, rather it clearly applied the statutory and common law of this state to the facts presented and rendered its judgment accordingly.

In so doing the California Court of Appeal held the evidence "clear" that Local 18 and its members were aware at all times that a fire bomb had been

thrown into respondent's building and also knew such act was wrongful and unlawful. The court found that knowing defendant Smith was charged with the offense and was being criminally prosecuted, petitioners attempted to avoid the effect of this evidence by asserting their belief that one "Suitcase" Jones had really thrown the incendiary device. The court found it clear that Local 18 had voted to concur in Smith's actions, elected to retain him as president, left him in full command of petitioners' picket lines and contribute to his defense fund. "In face of this evidence, it is difficult to see how any reasonable jury could have come to any other conclusion but to that Local 18 had ratified Smith's of throwing the incendiary bomb . . . the independent evidence of ratification by Local 18 was overwhelming" (Petitioners' Appendix A, page 13).

Viewing similar facts, the court also found "the record [to be] replete with evidence that Local 21 had authorized Smith to act as its own agent . . . [and] that plaintiff's refusal to employ members of Local 18 constituted the primary, if not the sole motivation for the participation of both unions in the formation of the picket line" (Petitioners' Appendix A, page 14). The court found Wagle and Hogan of Local 21 "both recruited members of Local 21 to participate in the picketing and they themselves participated" (Petitioners' Appendix A at page 15). The court clearly found "the evidence furnishes more ample support for finding that Smith was, at all relevant times, acting as the agent of both unions who

were jointly attempting to induce plaintiff to reemploy members of Local 18" (Petitioners' Appendix A at page 16). The California Court held "the evidence . . . failed to disclose any indication of an attempt by Local 21 to disassociate itself from Smith following the bomb-throwing incident. On the other hand, the evidence does contain ample indication of Local 21's unqualified approval of his conduct" (Petitioners' Appendix A at page 17).

These findings of fact are binding upon the federal court. The Court of Appeal's holding that "the evidence furnishes more ample support for finding that Smith was, at all relevant times, acting as the agent of both unions who were jointly attempting to induce plaintiff to reemploy members of Local 18" (Petitioners' Appendix A at page 16), must stand because the United States Supreme Court will accept as binding upon it the state court's decision of questions of state law. *Murdock v. Memphis,* 20 Wall. 590. Petitioners themselves argued before the Court of Appeal that the allegedly applicable federal legislation "incorporated guidelines identical to those adopted by California to determine the propriety of imposing punitive damages on a principal . . ." (Petitioners' Brief to the Court of Appeal of the State of California, First Appellate District, page 35).

2. FEDERAL LABOR LEGISLATION, PARTICULARLY SECTION 6 OF THE NORRIS-LaGUARDIA ACT (29 U.S.C. §106) DOES NOT PREEMPT STATE LAW.

By its very terms, Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106), found at Chapter 6, Title 29, referring to jurisdiction of courts, states a rule of law applicable "in any court of the United States." As used in Chapter 6, the term "Court of the United States" is explicitly limited to those courts "whose jurisdiction has been or may be conferred or denied or limited by an act of Congress, including the courts of the District of Columbia" [29 U.S.C. §113(d)]. Since the Superior Courts of California may not be so defined, Section 6 is clearly not binding upon them.

The crucial issue is "whether the application of state law in this kind of case will operate to frustrate the purpose of the federal legislation." *Colorado Anti-Discrimination Commission v. Continental Airlines,* 327 U.S. 714, 722; *Teamsters Local 20 v. Morton,* 377 U.S. 352. Imposition of state law remedies herein does not frustrate the purpose of the federal legislation. First the public policy, as announced at Section 2 of the Norris-LaGuardia Act (29 U.S.C. §102), is to allow labor an atmosphere of freedom to organize and collectively bargain to obtain acceptable terms and conditions of employment. This policy is neither frustrated nor circumvented by the state's legitimate exercise of its inherent police power to assure tranquility and to maintain the public order and safety. Rather the Supreme Court has:

> . . . Allowed the states to grant compensation for the consequences, as defined by the traditional law

> of torts, of conduct marked by violence and imminent threats to the public order . . . [citation omitted] . . . [S]tate jurisdiction has prevailed in those situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction . . . In the present case there is no such compelling state interest. *San Diego Building Trades v. Garmon,* 359 U.S. 236, 247-48.

Secondly, in deciding whether 29 U.S.C. §106 preempts California common law, this court has noted that Section 6 was intended to abrogate the doctrine of criminal conspiracy and its harsh imposition of criminal sanctions on the basis of vicarious or imputed liability. *United Brotherhood of Carpenters v. U.S.,* 330 U.S. 398, 404. It was the policy of Section 6 that "as a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond a reasonable doubt in order to impose liability" 330 U.S. at 406. Again, this purpose is not frustrated by the local court's application of its common law rules of agency.

Thirdly, this court has constantly upheld the right of states to apply their own common law rules of torts to impose local remedies to deal effectively with labor violence and threats thereof; this "to the protection of the compelling state interest in the maintenance of domestic peace" *United Mine Workers v. Gibbs,* 383 U.S. 715, 730; *Allen-Bradley v. Wisconsin Bd.,* 315 U.S. 740; *Youngdahl v. Rainfair, Inc.,* 355

U.S. 131; *U.M.W. v. Russell,* 356 U.S. 634. States have the power to entertain common law tort actions for damages even though the conduct upon which the suits are predicated constitutes an unfair labor practice under the Labor Management Relations Act (29 U.S.C. §141, *et seq.), United Construction Workers v Laburnum Constr., Inc.,* 347 U.S. 656. The states have jurisdiction to award damages to one prevented from entering his place of employment by mass picketing or threats of violence engaged in by members of the striking union *U.M.W. v. Russell,* 356 U.S. 634. Likewise, federal legislation does not deprive states of the power to enjoin mass picketing or picketing involving violence, notwithstanding interstate commerce would be effected thereby *Allen-Bradley Local v. Wisconsin Bd.,* 315 U.S. 740; *U.M.W. v. Russell, supra.* The basic premise lies in respect for our Federal system and upon recognition of the compelling state interest in maintaining domestic peace. Petitioners' assertion that federal law preempts imposition of state remedies is, therefore, insubstantial. It has been explicitly foreclosed. Consequently, review by this court should not be granted. *Street v. New York,* 394 U.S. 576, 581; Rule 19 of the Rules of the Supreme Court of the United States. Finally, the jurisdiction of the California court is guaranteed by 29 U.S.C. §187(b) and it is impowered to enforce the criminal penalties and common law penalties as they arise in labor violence. *United Construction Workers v. Laburnum Constr. Co.,* 347 U.S. 656, 666.

3. THE NORRIS-LaGUARDIA ACT WOULD NOT AFFECT THE DECISION BELOW.

In situations were the Norris-LaGuardia was involved the United States Supreme Court has allowed the states to grant compensation for the consequences of labor disputes once such is marked by violence and/or imminent threats to the public order, as defined by the state's traditional common law, *U.M.W. v. Russell,* 356 U.S. 634; *San Diego Bldg. Trade Council v. Garmen,* 359 U.S. 236; *United Constr. Workers v. Laburnum,* 347 U.S. 656; *Teamsters Local 20 v. Morton,* 377 U.S. 252. This court has constantly upheld the right of state courts to apply their own common law rules of torts and to impose their own remedies in order to effectively deal with labor violence and threats thereof; this "to the protection of the compelling state interest and the maintenance of domestic peace", *U.M.W. v. Gibbs,* 383 U.S. 715; *Allen-Bradley v. Wisconsin Bd.,* 315 U.S. 740; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131; *U.M.W. v. Russell,* 356 U.S. 634. Most recently it was held:

> "This court has constantly recognized the right of states to deal with violence and threats of violence appearing in labor disputes, sustaining they have a variety of remedial measures against the contention that state law was preempted by the passage of federal labor legislation" *U.M.W. v. Gibbs,* 383 U.S. at 715.

In *Gibbs* this court restricted the remedies available to those damages directly and proximately caused by the wrongful conduct chargeable to the defendant

as defined by the traditional law of torts, 383 U.S. at 731.

In the instant case, the trial court, the Court of Appeal (on two occasions), and the California Supreme Court found that on applying California common law ". . . Local 18 had ratified Smith's act of throwing the incendiary bomb . . . [and that] . . . the independent evidence of ratification by Local 18 was overwhelming" (Petitioners' Appendix A, at page 13). Similarly, the court held "the evidence furnishes more than ample support for finding that Smith was, at all relevant times, acting as the agent of both unions who were jointly attempting to induce plaintiff to reemploy members of Local 18" (Petitioners' Appendix A at page 16). The California Court concluded that "there was ample evidentiary support for findings that Smith was acting in the scope of his authority as an agent of both unions when he threw the bomb and that both unions . . . subsequently ratified this conduct on his part . . ." (Petitioners' Appendix A at page 17).

Respondent respectfully asserts that "clear proof" of petitioners' authorization, participation and ratification of the wrongful conduct of Smith exists and is sufficient to make the award of compensatory and punitive damages proper both under California law, which is not reviewable herein, and under the Norris-LaGuardia Act.

4. THE EVIDENCE ADMITTED TO PROVE PETITIONERS' ACTS OF RATIFICATION DID NOT INVADE THEIR RIGHTS NOR THOSE OF THEIR MEMBERS.

The restraints imposed by the First and Fourteenth Amendments of the United States Constitution limit State and Federal Governmental action respectively and are not restrictive of private activities. *Moose Lodge v. Irvis,* 407 U.S. 163; *Central Hardware Co. v. National Labor Relations Bd.,* 407 U.S. 539. Mere enforcement of a private right of action in a competent state court is not "state action" for purposes of either amendment. *Evans v. Abney,* 396 U.S. 435; *Moose Lodge v. Irvis,* 407 U.S. 163; *Central Hardware Co. v. N.L.R.B.* Rather the court must sift through and weigh the facts to make an independent determination of whether states action exists. *Gilmore v. Montgomery,* 417 U.S. 556. Respondent's enforcement of his common law rights in a state court of general jurisdiction is not, therefore, barred by either the First or Fourteenth Amendment. Moreover, petioners do not have standing to assert the Constitutional rights of their members *Tileston v. Ullman,* 318 U.S. 44; *Flast v. Cohen,* 392 U.S. 83; *Sierra Club v. Morton,* 405 U.S. 727. The exceptions to the general rule are not here applicable. *Griswald v. Connecticut,* 381 U.S. 497; *Sierra Club v. Morton, supra.*

Rights of assembly, association and free speech are not absolute and may not be used to further an evil which the state has a legitimate interest to control, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508. Conduct is not protected under the First Amendment when intended to ratify further

acts of intimidation and violence, *Hass v. Indiana,* 414 U.S. 105. In the instant case, the conduct of petitioners is not protected under First or Fourteenth Amendment because it was violent and/or intended to ratify violent activities. Therefore, the facts relied upon by the courts below to find and affirm common law liability are probative, clear and convincing, and not violative of the rights asserted.

CONCLUSION

For the foregoing reasons respondent respectfully prays this court deny the subject Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

Dated, San Francisco, California,
February 20, 1976.

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